

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

HUDSON INSURANCE COMPANY, a
Delaware Corporation,

Plaintiff,

VS.

Case No.: 2:15-cv-00349-GMN-CWH

ORDER

JAMES MILLER, individually; ARTURO MONTES, individually; JESUS MONTES, individually; EFRAIN MEZA-MONTES, individually,

Defendants.

COLONIAL FREIGHT SYSTEMS, INC.,

Intervenor,

Pending before the Court is a Motion for Attorney’s Fees (ECF No. 61) filed by Intervenor Colonial Freight Systems, Inc. (“Intervenor”) and Defendant James Miller (“Defendant”). Plaintiff Hudson Insurance Company (“Plaintiff”) filed a Response (ECF No. 64), and Intervenor and Defendant filed a Reply (ECF No. 66).

Also pending before the Court is Plaintiff's Motion for Rule 54(b) Certification. (ECF No. 62). Defendant and Intervenor filed a Limited Opposition (ECF No. 67), and Plaintiff filed a Reply (ECF No. 68).

I. BACKGROUND

This case arises out of an automobile accident that occurred on August 3, 2013, in Las Vegas, Nevada, involving Defendant, who was employed as an independent contractor for Intervenor. (Order 1:21–2:8, ECF No. 56). At the time of the accident, Defendant was the

1 named insured on a Non-Trucking Automobile Liability Insurance policy (“Non-Trucking
2 policy”) provided by Plaintiff. (*Id.* 3:11–13).

3 On February 27, 2015, Plaintiff filed a Complaint seeking declaratory relief that it “owes
4 no duty to defend or indemnify [Defendant]” in this action. (*Id.* 4:11–19). Plaintiff asserted that
5 Defendant’s Non-Trucking policy included a Business Purpose Exclusion, and Defendant was
6 acting in the business of Intervenor at the time of the accident. (*Id.* 6:21–24). Defendant timely
7 filed an Answer, asserting counterclaims for (1) breach of contract; (2) bad faith; and (3)
8 violation of NRS 686A.310. (*Id.* 4:20–22). Intervenor filed a Motion for Summary Judgment
9 seeking a finding that Plaintiff’s Non-Trucking policy provides coverage to Defendant for the
10 accident, which this Court granted on April 15, 2016. (*Id.* 4:18–19, 13:16–18). The Court first
11 found that North Carolina law applies. (*Id.* 7:1–24). Then, under North Carolina law, the Court
12 held that Defendant “was not furthering the business of Colonial at the time of the accident,”
13 and therefore, Plaintiff’s Non-Trucking policy applies and covers Defendant’s accident. (*Id.*
14 10:6–9).

15 The Court’s Order also resolved Plaintiff’s Motion to Dismiss Defendant’s
16 counterclaims. (*See id.* 11:6–12:18). The Court denied the motion as to Defendant’s claims for
17 breach of contract and bad faith. (*Id.* 11:10–12:12). However, the Court dismissed Defendant’s
18 Nevada statutory claim for violation of NRS 686A.310 because North Carolina law applies and
19 gave Defendant leave to amend. (*Id.* 12:13–18). On April 27, 2016, Defendant timely filed his
20 amended counterclaims. (ECF No. 58).

21 In the instant motions, Intervenor and Defendant seek attorney’s fees under North
22 Carolina General Statute § 6-21.5. (Mot. Att’y Fees 2:4–5, ECF No. 61). At the same time,
23 Plaintiff seeks a Federal Rule of Civil Procedure (“FRCP” or “Rule”) 54(b) certification to
24 appeal the issue of law determined by the Court’s Summary Judgment Order (ECF No. 56) and
25 to stay this case pending the Ninth Circuit’s decision. (Mot. 54(b) Cert. 5:7–11, ECF No. 62).

1 **II. Motion for Attorney's Fees**

2 **A. Legal Standard**

3 Under N.C. Gen. Stat. § 6-21.5, upon the motion of the prevailing party, the court may
 4 award attorney's fees if the court finds "either: (1) the pleadings contain a complete absence of
 5 a justiciable issue of either law or fact, or (2) whether the losing party persisted in litigating the
 6 case after a point where he should reasonably have become aware that the pleading he filed no
 7 longer contained a justiciable issue." *McKinnon v. CV Indus., Inc.*, 745 S.E.2d 343, 349 (N.C.
 8 Ct. App. 2013) (citing *Credigy Receivables, Inc. v. Whittington*, 689 S.E.2d 889, 893 (N.C. Ct.
 9 App. 2010)). The purpose of N.C. Gen. Stat. § 6-21.5 is to prevent frivolous lawsuits. *Persis*
 10 *Nova Constr. v. Edwards*, 671 S.E.2d 23, 30 (N.C. Ct. App. 2009). A grant of summary
 11 judgment, standing alone, is not sufficient to support an award of attorney's fees. N.C. Gen.
 12 Stat. § 6-21.5. Because the statute detracts from the common law, it must be strictly
 13 construed. *Persis Nova Constr.*, 671 S.E.2d at 29 (citation omitted).

14 **B. Discussion**

15 In their Motion for Attorney's Fees, Intervenor and Defendant seek "an award of
 16 attorney's fees in the amount of \$45,268.50." (Mot. Att'y Fees 2:5-6). Intervenor and
 17 Defendant argue that this is appropriate under N.C. Gen. Stat. § 6-21.5 "because there was a
 18 complete absence of a justiciable issue of either law or fact raised by [Plaintiff] in its Complaint
 19 for Declaratory Relief." (*Id.* 4:13-15).

20 The Court of Appeals of North Carolina has explained:

21 A "justiciable issue" is not defined by our statutes or case law. A "justiciable
 22 controversy" is a real and present one, not merely an apprehension or threat of suit
 23 or difference of opinion. Presumably, a "justiciable controversy" involves
 24 "justiciable issues," thus those which are real and present, as opposed to imagined
 25 or fanciful. "Complete absence of a justiciable issue" suggests that it must
 conclusively appear that such issues are absent even giving the losing party's
 pleadings the indulgent treatment which they receive on motions for summary
 judgment or to dismiss.

1 *Sprouse v. N. River Ins. Co.*, 344 S.E.2d 555, 565 (N.C. Ct. App. 1986) (internal citations
 2 omitted). Intervenor and Defendant contend that “prior to filing this action, [Plaintiff] had
 3 taken two separate recorded statements from [Defendant] wherein he confirmed that he was not
 4 of the business of [Intervenor] at the time of the August 3, 2013 accident.” (*Id.* 5:9–11). They
 5 also argue that Plaintiff has a “long history of accepting claims from independent contractors of
 6 [Intervenor] with similar facts as the instant matter.” (*Id.* 5:3–5).

7 The Court finds that Intervenor and Defendant’s assertions fail to conclusively establish
 8 the lack of any “real and present” issues. Intervenor and Defendant present an oversimplified
 9 version of the facts that does not take into account the legal interpretation disputes in this case.
 10 First, in the cross-motions for summary judgment, the parties disputed choice of law. (*See*
 11 Order 7:1–24). Then, the Court found that the key phrase within the Business Purpose
 12 Exclusion of the Non-Trucking policy—“in the business of”—was ambiguous. (*Id.* 8:1–20).
 13 Finally, the Court had to apply vicarious liability under the doctrine of *respondeat superior* to
 14 determine whether the Business Purpose Exclusion from the contract applied. (*Id.* 8:21–17).
 15 As such, this case clearly presented “real and present” issues for this Court to determine.
 16 Accordingly, the Court finds that Plaintiff’s case involved justiciable issues, and Intervenor and
 17 Defendant are not entitled to attorney’s fees under N.C. Gen. Stat. § 6-21.5.

18 **III. Motion for Rule 54(b) Certification**

19 **A. Legal Standard**

20 In cases with multiple claims and multiple parties, the district court may enter final
 21 judgment against some, but not all, of the claims or parties when the court determines that there
 22 is no just reason for delay. Fed. R. Civ. P. 54(b). In deciding whether to certify an order under
 23 Rule 54(b), the district court must determine (1) that the Order is a “final judgment,” and
 24 (2) whether there is a just reason to delay appeal. *Curtiss-Wright Corp. v. General Elec. Co.*,
 25 446 U.S. 1, 7–8 (1980). To determine if a just reason exists to delay the appeal, “a district

1 court must take into account judicial administrative interests as well as the equities involved.”
2 *Curtiss-Wright Corp.*, 446 U.S. at 8. Courts should not grant certification under Rule 54(b)
3 routinely. *Wood v. GCC Bend, LLC*, 422 F.3d 873, 878 (9th Cir. 2005). However, “Rule 54(b)
4 certification is proper if it will aid ‘expeditious decision’ of the case.” *Texaco, Inc. v. Ponsoldt*,
5 939 F.2d 794, 797 (9th Cir. 1991) (citing *Sheehan v. Atlanta Int’l Ins. Co.*, 812 F.3d 465, 468
6 (9th Cir. 1987)). “The mere presence of [counterclaims] . . . does not render a Rule 54(b)
7 certification inappropriate.” *Curtiss-Wright Corp.*, 446 U.S. at 9.

8 Additionally, a district court has discretionary power to stay proceedings in its own
9 court. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). This power to stay is “incidental to the
10 power inherent in every court to control the disposition of the causes of action on its docket
11 with economy of time and effort for itself, for counsel, and for litigants.” *Id.* In exercising its
12 discretion, the court must “rest on considerations of wise judicial administration, giving regard
13 to conservation of judicial resources and comprehensive disposition of litigation.” *Colorado*
14 *River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976).

15 **B. Discussion**

16 Plaintiff requests that this Court allow an immediate appeal under FRCP 54(b) of its
17 Order granting Intervenor’s Motion for Summary Judgment (ECF No. 56), despite Defendant’s
18 pending counterclaims. (Mot. 54(b) Cert. 2:22–24). Intervenor and Defendant do not oppose
19 the Rule 54(b) certification. (Resp. to Mot. 54(b) Cert. 2:3–4, ECF No. 67). First, the Court
20 finds that its Order (ECF No. 56) is a “final judgment.” *See Curtiss-Wright Corp.*, 446 U.S. at
21 7. Second, as to whether there exists a just reason to delay, the Court considers such factors as
22 whether “the claims under review were separable from the others remaining to be adjudicated,”
23 another appellate court may have to decide the same issue more than once, or “an appellate
24 resolution of the certified claims would facilitate a settlement of the remainder of the claims.”
25 *Id.* at 8, 8 n.2. Here, Plaintiff suggests, and the Court agrees, “A decision by the Ninth Circuit
on this matter would bring a sense of finality to this issue which would certainly streamline the

1 times and potentially resolving [Defendant's] Counterclaim[s] and would allow the parties to
2 proceed forward involved in an expeditious manner.” (Mot. 54(b) Cert. 2:17–20). Further, the
3 legal issue being appealed is unlikely to require another appellate court to review the same
4 issue again in the future. Lastly, such a certification does not present any inequity to the other
5 parties, as they do not oppose the 54(b) certification. As such, the Court finds that there is no
6 just reason to delay appeal, and the Court grants Plaintiff's Motion for 54(b) Certification.

7 In its Motion for 54(b) Certification, Plaintiff also requests to stay the proceedings
8 pending the appeal. (Mot. 54(b) Cert. 5:9–11). Intervenor and Defendant oppose the stay, but
9 provide no points and authorities to support their opposition. (Resp. to Mot. 54(b) Cert. 2:4–5).
10 Pursuant to District of Nevada Local Rules, “The failure of an opposing party to file points and
11 authorities in response to any motion . . . constitutes a consent to the granting of the motion.”
12 (D. Nev. LR 7-2(d)). As such, the Court may grant Plaintiff's request for a stay under the
13 Local Rules. However, the Court also finds that a stay is appropriate here in the interest of
14 “wise judicial administration.” *See Colorado River Water Conserv. Dist.*, 424 U.S. at 817.
15 Defendant's Amended Counterclaims include breach of insurance contract, bad faith breach of
16 insurance contract, and unfair and deceptive trade practices. (Am. Countercls. ¶¶ 23–47, ECF
17 No. 58). These counterclaims clearly relate to this Court's Summary Judgment Order that
18 Plaintiff is appealing under Rule 54(b). As the Court noted above, a resolution by the Ninth
19 Circuit will likely aid in the resolution of Defendant's counterclaims. Accordingly, the Court
20 finds it appropriate to grant a stay in the interest of judicial economy.

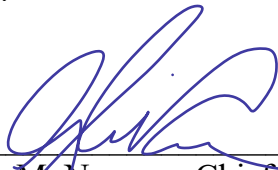
21 **IV. CONCLUSION**

22 **IT IS HEREBY ORDERED** that Intervenor and Defendant's Motion for Attorney's
23 Fees (ECF No. 61) is **DENIED**.

1 **IT IS FURTHER ORDERED** that Plaintiff's Motion for 54(b) Certification and Stay
2 (ECF No. 62) is **GRANTED**. The Clerk shall enter judgment as to Plaintiff's claims in
3 accordance with the Court's April 15, 2016 Order (ECF No. 56).

4 **IT IS FURTHER ORDERED** that this case is **STAYED** pending appeal.

5 **DATED** this 16 day of December, 2016.

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10 Gloria M. Navarro, Chief Judge
11 United States District Court
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